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Supreme Court of the United States

No. 242

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES, CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, A CORPORATION, PETITIONERS,

VS.

SIMONDS-SHIELDS-LONSDALE GRAIN COMPANY, A CORPORATION, RESPONDENT.

RESPONDENT'S PETITION FOR REHEARING.

M. W. BORDERS, JR.,
DUPUY G. WARRICK,
WILFRED WIMMELL,
Counsel for Respondent.

INDEX

Point I 1
Point II 2
Point III 4
Point IV 5
Point V 6
Point VI 7
Conclusion 8
Certificate of Counsel 9

Table of Cases

American Railway Express Co. vs. American Trust Co., 47 F. (2d) 16, cert. den. 284 U. S. 629 6
Atlantic Bridge Co. vs. Atlantic Coast Line R. R. Co., 36 F. (2d) 163 8
Davis vs. Henderson, 266 U. S. 92, 69 L. Ed. 182 ..... 6, 8
Davis vs. Cornwell, 264 U. S. 560, 68 L. Ed. 848 ..... 6, 8
Drake vs. Mo. State Life Ins. Co., 21 F. (2d) 41 5
Gulf P. & S. Ry. vs. Hefley, 158 U. S. 98 8
K. C. Southern Ry. vs. Albers Com. Co., 223 U. S. 575 8
K. C. Southern Ry. Co. vs. Carl, 227 U. S. 639 8
La Compania Bilbiana de Nagegacion De Bilboa vs. The Spanish-American Light & Power Co., 36 L. Ed. 1054, 146 U. S. 483 5
Louisville & N. R. Co. vs. Chatters, 279 U. S. 320, 73 L. Ed. 711 6
McWilliams Bros. vs. Davis, 285 Fed. 312 5
McCaffrey's Sons vs. Director General of Railroads, 282 Fed. 730 5
Southern Pacific Co. vs. Lothrop, 15 F. (2d) 486 8
Updike Grain Co. vs. C. & N. W. Ry., 33 F. (2d) 486 8
Union Wire Rope Corporation vs. A., T. & S. F. Ry., 66 F. (2d) 965 8
VanDusen Harrington Co. vs. Northern Pacific Railway Co., 32 F. (2d) 466, 60 F. (2d) 394 6

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RESPONDENT'S PETITION FOR REHEARING.

Comes now Simonds-Shields-Lonsdale Grain Company, respondent herein, and respectfully petitions the court to grant it a rehearing in this cause for the following reasons:

I.

In its opinion this court permits a recovery for grain doors installed between July 1, 1935, and February 29, 1936. The basis for the court's opinion is that the letter of July 2, 1935, was sufficient to constitute a "prior arrangement." The court says:

> "The letter of July 2, 1935, from the shippers required the installation of the grain doors and the respective orders for the separate cars, given thereafter, were given in the light of this demand for cars so equipped. We think this was an arrangement under the tariff."

If it be conceded that the opinion of this court is correct, nevertheless there should not be any recovery for grain doors installed subsequent to November 22, 1935, because on that date the shippers unequivocally terminated any possibility of their prior conduct being interpreted as a prior arrangement. On that date they wrote the carriers denying that a prior arrangement had been made and disavowing liability because:

> "We have made no arrangement with any carrier under which such carrier was to install the doors as our agent as contemplated by the tariff above referred to" (R. 44).

While we earnestly contend that no prior arrangement was made by the letter of July 2, 1935, nevertheless, if this letter were sufficient for that purpose the prior arrangement and agency, if any, was discontinued by the letter of November 22, 1935. We cannot understand how it could possibly be contended that any prior arrangement and agency continued to exist after the shippers wrote their letter on November 22, wherein they disavowed and repudiated the existence of any agency or prior arrangement. In its opinion this court has inadvertently overlooked the foregoing facts, thereby permitting a recovery for cars on which grain doors were installed subsequent to November 22, 1935.

II.

In its opinion this court has said:

> "On July 2, 1935, the respondent clearly signified its desire for cars fully coopered and ready for loading. Its letter of that date was an unconditional request for the petitioners' services for a sufficiently specified period of time—'from and after July 1, 1935.'"

In holding that there was an "*unconditional*" request, this court has overlooked facts showing that the request of the shippers to install grain doors was upon the condition that the carriers stand the expense. The letter of

July 2 demanded the services on the condition that the carriers pay for installation, for the shippers unequivocally emphasized that they would not pay for the installations (R. 41, 42).

This court inadvertently overlooks the significant fact that the letter of July 2 could not have constituted a "prior arrangement" because the carriers did not so construe it. Nor did they construe the demand for grain door installations as unconditional. Indeed, they recognized a conditional demand and in written reply asked that the shippers make "*unqualified* arrangements" as required by the tariff, otherwise the carriers would "provide cars which do not have the grain doors installed" (R. 43). The opinion of this court gives no consideration to these facts which, we submit, are not only significant, but should be controlling.

On November 22, 1935, the shippers denied that the carriers were authorized to install car doors as their agents (R. 44). On January 9, 1936, the shippers again denied that any prior arrangement had been made. On March 30, 1936, the carriers wrote the shippers again asking that the shippers "advise whether you elect to have carriers furnish cars with grain doors or lumber installed, or whether you elect to install grain doors or lumber for your own account." The opinion of this court in holding that there was a prior arrangement has overlooked and ignored the foregoing facts showing that the shippers never intended to create a prior arrangement and that the carriers recognized that such arrangement had not been created but were continuously attempting to secure the necessary authorization to constitute them the "shipper's agent" and to establish "a prior arrangement." If there is anything apparent from the record in this case, it is that the shippers were unwilling to pay $1.00 a car for grain door installations (it should be kept in mind that the interstate commerce commission had not yet reduced the amount recoverable to 60 cents) and that their demands for installation were conditioned upon the carriers standing the

cost. We do not believe that a more significant or i portant condition could have been imposed on the shippe demands than that which they did impose, viz., that t carriers stand the expense of installation and we earnes submit that this court has overlooked controlling facts holding that the request was "unconditional."

III.

This court has overlooked and disregarded the de sions of this and other courts directly holding that, whe one demands the performance of services of another a the demand is accompanied by an insistence that the ser ices be performed at the other's cost, and without liabili to the person asking, there is no liability and there can no recovery. This court states:

> "The announcement that respondent would d cline to pay for them in no way qualified the reque for tariff services, and cannot now stave off liabilit The petitioners could disregard this advance di claimer of liability and rely upon the courts to e force observance of the tariff."

In support of its decision, the court cites no authorit There is none to sustain it. The statement that the p titioners could disregard disclaimer of liability and re upon the courts to enforce observance of the tariff ignor the fact that there could be no liability under the tari if the demand for grain door installations was qualifi in the manner it was in this case, because such qualific tion showed that there was no prior arrangement and th the carriers were not the "shipper's agent" as required b the tariff. The statement made by the court might be a plicable where the agency or prior arrangement was pr viously existing, but here it was not, and in applying suc simple rule to this case the court has disregarded the d cisions of this and other courts (all of which are cited i respondent's brief) which hold that, where one demand the performance of services of another and accompani

his demand by an insistence that the services be performed at the other's cost and without liability on him, there is no right of recovery. *La Compania Bilbiana de Navegacion De Bilboa* v. *The Spanish-American Light & Power Co.*, 36 L. Ed. 1054, 146 U. S. 483; *McWilliams Bros.* v. *Davis*, 285 Fed. 312; *McCaffrey's Sons* v. *Director General of Railroads*, 282 Fed. 730; *Drake* v. *Mo. State Life Ins. Co.*, 21 F. (2d) 41.

The only excuse for refusing to apply the foregoing rule to the instant case would be because this is a suit for railroad charges, but this is no answer because here the railroad was offering to perform a shipper's service as the shipper's agent, provided there was a prior arrangement for such agency between the two.

IV.

This court has overlooked the fact that the rule that tariffs must be strictly construed and that they have the force and effect of law applies equally to the requirement of an agency as to other matters. This tariff provided "the railroad will act as *shipper's agent* and install grain doors at terminal elevator points specified below, at a charge of $1.00 per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time."

When this court holds, as it does, that the agency may be found in the demand for installations at the carriers' expense, although accompanied by a disavowal of liability and of prior arrangement on the part of the shippers, it disregards every principle of contract and agency law to the effect that agency may not be created in such manner. In fact, it would appear that the court substitutes a new law to the effect that the provisions of a conditional offer may be accepted and the conditions thereof disregarded. Moreover, this court further disregards the numerous decisions of this court holding that all tariff provisions must be strictly complied with and can-

not be waived. *Davis* v. *Henderson*, 266 U. S. 92, 69 Ed. 182; *Louisville & N. R. Co.* v. *Chatters*, 279 U. 320, 73 L. Ed. 711; *Davis* v. *Cornwell*, 264 U. 560, 68 L. Ed. 848; *VanDusen Harrington Co.* v. *Northe Pacific Railway Co.*, 32 F. (2d) 466, 60 F. (2d) 394; *Amer can Railway Express Co.* v. *American Trust Co.*, 47 (2d) 16, cert. den. 284 U. S. 629.

V.

This court has inadvertently overlooked the fact th the Interstate Commerce Commission not only di approved the charge of $1.00 per car, but that it direct the railroads to file a new tariff. This court says:

> "The commission did not hold the tariff unlaw ful or wholly unreasonable. It clearly recognized t validity of a tariff charge for installation servic rendered by carriers at the request of shippers, b found $1.00 per car unreasonable to the extent th it exceeded 60 cents."

This holding overlooks the fact that the Interstat Commerce Commission did not simply reduce the amou of the charge and approve the existing tariff. It direct the carriers to establish a new tariff (R. 69, 70). Th issue submitted to this court in the briefs was wheth a recovery in this action based upon the original tari could be had when the original tariff for $1.00 per c was held unreasonable and a new tariff fixing a ra of 60 cents per car was established The court has n decided the issue submitted.

Moreover, this court has inadvertently overlooked th significance of the fact that the tariff provided a charg of $1.00, and that it was after this suit was filed that th Interstate Commerce Commission reduced the charge 60 cents. The court says:

> "The voluntary reduction of their claim by the petitioners is a sensible adjustment of their right to recover the tariff charge and of their obligation to make reparation to the extent that it is unreasonable."

To say that to permit a recovery of 60 cents is a "sensible adjustment" ignores that these facts were and are most significant in determining whether a "prior arrangement" whereby the carriers were "shipper's agent" was made. It is perfectly apparent that the shippers were unwilling to pay $1.00 per car. The Interstate Commerce Commission has held that the real value of the services rendered was not more than 60 cents. How can it be said that when the shippers disavowed any obligation to pay $1.00 per car there nevertheless was a prior arrangement under the $1.00 tariff, although the $1.00 tariff was held unreasonable? Had the tariff been 60 cents originally, the shippers might have been willing to constitute the carriers their agents but it cannot reasonably be argued that it makes no difference because the reduction of the claim to 60 cents constitutes a "sensible adjustment." If there was no arrangement to pay the $1.00 charge (and there was not because the shippers denied liability and because the charge of $1.00 was held unreasonable), it cannot be supplied simply because the unreasonable charge has been reduced to a reasonable amount.

VI.

This court has overlooked the established rule that tariffs must be strictly construed and, if ambiguous, are construed against the carriers. The courts have long since established that uniformity and the prohibition of rebates is best secured by a strict construction of tariffs. If this court feels that the points urged in this petition for rehearing are insufficient to show that the court has inadvertently overlooked significant facts and failed to decide important legal issues, respondent believes that its reason for doing so must be a belief that tariff provi-

sions in a case like this must be liberally construed in order that carriers may recover compensation for services rendered. We appreciate the equities that might seem to indicate the fairness in a recovery. Nevertheless, the law has always been and is now that provisions of a carrier's tariff must be strictly construed, cannot be waived and are to be construed favorably to the shipper. *Davis* v. *Henderson*, 266 U. S. 92, 69 L. Ed. 182; *Davis* v. *Cornwell*, 264 U. S. 560, 68 L. Ed. 848; *Southern Pacific Co.* v. *Lothrop*, 15 F. (2d) 486; *Atlantic Bridge Co.* v. *Atlantic Coast Line R. R. Co.*, 36 F. (2d) 163; *Union Wire Rope Corporation* v. *A., T. & S. F. Ry.*, 66 F. (2d) 965; *Updike Grain Co.* v. *C. & N. W. Ry.*, 33 F. (2d) 486; *K. C. Southern Ry.* v. *Albers Com. Co.*, 223 U. S. 575; *Gulf P. & S. Ry.* v. *Hefley*, 158 U. S. 98; *K. C. Southern Ry. Co.* v. *Carl*, 227 U. S. 639.

We earnestly submit that the decision of this court can be sustained only by the most liberal interpretation which is not in harmony with the foregoing decisions. If the rule heretofore applied is to be disapproved in a case like this, then we respectfully submit that it should be directly decided.

CONCLUSION.

It is respectfully submitted that the opinion of this court holding that there was a "prior arrangement" and that the carrier was the "shipper's agent" overlooks and ignores the fact that it was not the intention of the shippers that their demands constitute a prior arrangement, that neither the shippers nor the railroads considered the demands sufficient to create such prior arrangement, that the facts are insufficient as a matter of law to constitute the railroad "shipper's agent," and that respondent should be granted a rehearing.

If this court should adhere to the views expressed in its opinion, it is respectfully suggested that in any

event the opinion should be modified so as to limit the recovery to grain doors installed between July 2, 1935, and November 22, 1935.

Respectfully submitted,

M. W. BORDERS, JR.,
DUPUY G. WARRICK,
WILFRED WIMMELL,
Counsel for Respondent.

CERTIFICATE OF COUNSEL.

We, M. W. Borders, Jr., Dupuy G. Warrick and Wilfred Wimmell, counsel for respondent herein, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay or vexation; that in our opinion it is meritorious and well founded in fact and law.

M. W. BORDERS, JR.,
DUPUY G. WARRICK,
WILFRED WIMMELL,
Counsel for Respondent.

P 1

SUPREME COURT OF THE UNITED STATES.

No. 342.—October Term, 1938.

Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees, Chicago, Rock Island and Pacific Railway Company, Petitioners,
vs.
Simonds-Shields-Lonsdale Grain Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[March 27, 1939.]

Mr. Justice Reed delivered the opinion of the Court.

This case is here on certiorari to review the judgment of the Circuit Court of Appeals for the Eighth Circuit affirming a judgment of the district court for the respondent. Certiorari was granted for consideration of a federal question of substance, to wit, whether a carrier's charge for services, actually utilized by a shipper and authorized by a tariff requiring prior arrangements for the services, are uncollectable when the services are rendered on orders, preceded or accompanied by denials of legal liability. Substantial conflict was alleged.[1]

The facts were stipulated. The petitioners, as trustees of the Chicago, Rock Island and Pacific Railway Company, brought suit, under Section 24(8) of the Judicial Code,[2] in the United States District Court for the Western District of Missouri, for the value of services rendered in the installation of grain doors on box cars used by the respondent to ship grain in bulk in interstate commerce. Grain doors are required to prevent leakage of grain from the car while in transit. They are wooden barriers which must be placed inside the box car doors before loading and removed upon unloading. Before July 1, 1935, they were furnished and installed by carriers without separate charge. Effective that day, a tariff

[1] Cf. Wabash R. R. Co. v. Horn, 40 F. 2d 905, 906 (C. C. A. 7).

[2] 28 U. S. C. § 41. "The district courts shall have original jurisdiction as follows: . . . Eighth. Of all suits and proceedings arising under any law regulating commerce." See Louisville & Nashville R. R. v. Rice, 247 U. S. 201, 203.

filed with the Interstate Commerce Commission continued the carriers' practice of furnishing the materials for grain doors but shifted the cost of installation to the shippers. It provided as follows: "The railroad will act as shipper's agent and install grain doors . . . at a charge of one dollar ($1.00) per car; prior arrangements for the service to be made with the carriers and to cover a specified period of time . . . ."

On July 2, 1935, the day after the tariff went into effect, the respondent, together with other shippers, addressed a letter to the local freight agents of several carriers, including the Chicago, Rock Island and Pacific, in which they announced that despite the tariff they expected the railroads, from and after July 1, 1935, to furnish cars with equipment to carry bulk grain safely, and would decline to pay for the service of installing grain doors in the cars. They wrote in part: "Said undersigned parties further notify you that if ordinary box cars are furnished and supplied upon such orders [for cars for the shipment of bulk grain] they will expect them to be fully coopered or prepared with necessary side-door barricades completely installed and ready for loading."

The carriers protested that neither they nor the shippers could be parties to practices not in conformity with the tariff. They declared that unless the shippers made unqualified arrangements pursuant to the terms of the tariff, cars would be furnished without the grain doors installed. This letter, dated July 15, 1935, evoked no reply. Between July 1, 1935, and February 29, 1936, the petitioners upon the orders of respondent supplied the Grain Company with 624 box cars for the shipment of grain in bulk. Before the cars were loaded, the petitioners installed the necessary grain doors. Bills, rendered monthly, charged the respondent $1.00 for each car. On November 22, 1935, the latter returned the bills, declining to pay on the ground that it had made no arrangement for the petitioners to install grain doors as its agents, as contemplated by the tariff. It concluded with a request that petitioners reveal the justification for the charges in the absence of any arrangement. The petitioners' agent replied on January 9, 1936, that the letter of July 2, 1935, had been construed to effect an arrangement and "accepting such prior arrangement, the cars were coopered for your account and as your agent, and were accepted and used by you as such." By letter of January 15, 1936, the respondent disagreed with petitioners' construction of the letter of July 2, 1935, and reiterated its intention not to pay.

On April 4, 1936, the petitioners began this suit, asking judgment for $624. Before trial in the district court, the Interstate Commerce Commission passed upon the validity and reasonableness of the charge for this particular service. On April 12, 1937, the Commission ruled that it was proper to require the shipper to bear the expense of installing grain doors furnished by the carrier; that the clause relative to prior arrangements was not ambiguous; that it was for the carrier's benefit and could be waived; that the charge of $1.00 per car was unreasonable and should be limited to $.60 per car. It ruled further that shippers who had paid the $1.00 charge were entitled to reparation and that carriers might waive collection above the sixty-cent charge from shippers who had not yet paid. 220 I. C. C. 753.[3] The petitioners reduced their demand in the district court to $.60 per car and asked judgment for $374.40.

The district court gave judgment for the respondent. 19 F. Supp. 438. The circuit court of appeals affirmed, one judge dissenting. 97 F. 2d 816.

The ruling of the Interstate Commerce Commission determines that the installation is a duty of the shipper and that the carrier can only receive sixty cents when it acts for the shipper in performing that duty. These are the essential provisions of the tariff. To facilitate the rendition of the service prior arrangements are required. The dominant elements are the responsibility for and the amount of the charge. These are fixed by the tariff. The letter of July 2, 1935, from the shippers required the installation of the grain doors and the respective orders for the separate cars, given thereafter, were given in the light of this demand for cars so equipped. We think this was an arrangement under the tariff. On July 2, 1935, the respondent clearly signified its desire for cars fully coopered and ready for loading. Its letter of that date was an unconditional request for the petitioners' services for a sufficiently specified period of time—"from and after July 1, 1935." The announcement that respondent would decline to pay for them in no way qualified the request for tariff services, and cannot now stave off liability. The petitioners could disregard this advance disclaimer of liability and rely upon the courts to enforce observance of the tariff. Until

[3] Three commissioners dissented. The decision of the Commission is part of the record. A. J. Phillips Co. v. Grand Trunk W. Ry., 236 U. S. 662, 664; cf. Robinson v. Baltimore & Ohio R. R., 222 U. S. 506, 511-12.

changed, tariffs bind both carriers and shippers with the force of law.[4] Under Section 6 of the Interstate Commerce Act the carrier cannot deviate from the rate specified in the tariff for any service in connection with the transportation of property.[5] That section forbids the carrier from giving a voluntary rebate in any shape or form. This Court has had occasion recently to sustain action of the Commission aimed at carriers' practices resulting in collection of less than the tariff rate.[6] It is equally important to aid the efforts of a carrier in collecting published charges in full.[7] Involuntary rebates from tariff rates should be viewed with the same disapproval as voluntary rebates.

The respondent suggests that the suit must fail because based upon a tariff held by the Interstate Commerce Commission "unreasonable and unlawful." The Commission did not hold the tariff unlawful or wholly unreasonable. It clearly recognized the validity of a tariff charge for installation services rendered by carriers at the request of shippers, but found $1.00 per car unreasonable to the extent that it exceeded $.60. It awarded reparation to those who had paid $1.00 per car and authorized the carriers to waive collection of the amount over $.60 per car from shippers who had not paid.[8] The only relief afforded respondent by the Commission's decision is a right to reparation for all payments over $.60 per car.[9] The voluntary reduction of their claim by the petitioners is a sensible adjustment of their right to recover the tariff charge and of their obligation to make reparation to the extent that it is unreasonable.

It is unnecessary to consider various other contentions made by both the petitioners and the respondent.

Judgment reversed.

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[4] Robinson v. Baltimore & Ohio R. R., 222 U. S. 506, 509; Pennsylvania R. R. Co. v. International Coal Co., 230 U. S. 184, 197.

[5] Act of Feb. 4, 1887, 24 Stat. 379, 381, as amended, 49 U. S. C. § 6(7).

[6] Baltimore & Ohio R. R. v. United States, January 3, 1939.

[7] Cf. Pittsburgh, C., C. & St. L. R. R. v. Fink, 250 U. S. 577; N. Y. Cent. & H. Riv. R. R. v. York & Whitney Co., 256 U. S. 406.

[8] Chicago Board of Trade v. Abilene & S. Ry., 220 I. C. C. 753, 769.

[9] Cf. A. J. Phillips Co. v. Grand Trunk W. Ry., 236 U. S. 662, 665; Arizona Grocery Co. v. Atchison T. & S. F. Ry., 284 U. S. 370, 384.